Supreme Court, U.S.
FILED

94 292 AUG 16 1994

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

PITTSBURG STATE UNIVERSITY, *PETITIONER,*

vs.

CHET A. HURD, *RESPONDENT.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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20 pp

QUESTIONS PRESENTED FOR REVIEW

Whether Congress abrogated the states' eleventh amendment immunity when it enacted the Age Discrimination in Employment Act (ADEA)?

Whether Congress had power to abrogate the states' eleventh amendment immunity when it exercised commerce clause powers in enacting the ADEA?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i
TABLE OF AUTHORITIES iii
OPINIONS BELOW 1
PARTIES TO THE ACTION 1
JURISDICTION 2
CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE 2
STATEMENT OF THE CASE 2
REASONS FOR GRANTING WRIT 3
CONCLUSION 6
APPENDIX A ..... App. 1
APPENDIX B ..... App. 3

Page

TABLE OF AUTHORITIES

Cases:

Atascadero State Hospital v. Scanlon, 473 U.S. 234, 105 S.Ct. 3142, 87 L.Ed. 2d 171 (1985) 3, 4
Dellmuth v. Muth, 491 U.S. 223, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) 3, 4
EEOC v. Wyoming, 460 U.S. 226, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) 5
Employees v. Missouri Public Health Department, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973) 3, 4
Fitzpatrick v. Bitzer, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976) 5
Hurd v. Pittsburg State University, F.2d (10th Cir. 1994) (93-3082) 1
Hurd v. Pittsburg State University, 821 F.Supp. 1411 (D.Kan. 1993) 1
Pennsylvania v. Union Gas Co., 491 U.S. 1, 109 S.Ct. 2273, 105 L.Ed. 2d 1 (1989) 4, 5
Pennhurst State School & Hospital v. Halderman, (Pennhurst II) 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) 4
Puerto Rico Auth. v. Metcalf & Eddy, Inc., 506 U.S.___, 113 S.Ct. 684, 121 L.Ed.2d 605 (1993) ... 3

Page

Constitutions and Statutes

U.S. Const. art. I, § 8, cl. 3
(Commerce Clause) 3, 4, 5, 6
U.S. Const. amend. XI 2, 3, 4, 5, 6
U.S. Const. amend. XIV 3, 4, 5
28 U.S.C. § 1254 2
29 U.S.C. § 626 (c) (1) 2, 3

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

PITTSBURG STATE UNIVERSITY,
PETITIONER,
VS.
CHET A. HURD,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner Pittsburg State University respectfully requests a writ of certiorari to review the judgment and opinion of the Tenth Circuit entered in this proceeding on July 12, 1994.

OPINIONS BELOW

Hurd v. Pittsburg State University, ___ F.2d ___ (10th Cir. 1994) (93-3082) (App. A).

Hurd v. Pittsburg State University, 821 F.Supp. 1411 (D.Kan. 1993) (App. B).

PARTIES TO THE ACTION

In addition to those parties listed in the caption, William Mark Simmons was a defendant at the trial court level and the U.S. Equal Employment Opportunity Commission participated as *amicus curiae* at the circuit level.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on July 12, 1994 and this petition is filed within ninety days of that date. Rehearing was not requested. 28 U.S.C. § 1254 (1) confers jurisdiction upon this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

U.S. Const. amend. XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by Citizens or Subjects of any Foreign State.

29 U.S.C. § 626 (c) (1):

Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

STATEMENT OF THE CASE

Respondent brought an action in federal court alleging respondent violated the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* App. B at 3. It is undisputed that petitioner is a state agency entitled to eleventh amendment immunity unless that immunity is

properly abrogated. App. B at 3. Petitioner filed a motion to dismiss contending it was immune from suit in federal court under the ADEA because of eleventh amendment immunity. App. B at 4. The trial court denied the motion (app. B. at 9) and petitioner took an immediate appeal. *See Puerto Rico Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. ____, 113 S.Ct. 684, 687, 121 L.Ed.2d 605, 612 (1993). The Tenth Circuit adopted the opinion of the trial court with minor supplementation. App. A at 2.

REASONS FOR GRANTING WRIT

1. Whether Congress abrogated the states' eleventh amendment immunity when it enacted the Age Discrimination in Employment Act (ADEA)?

In *Employees v. Missouri Public Health Department*, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251, (1973) this Court found the phrase "[a]ction to recover such liability may be maintained in any court of competent jurisdiction . . . " was insufficient to abrogate eleventh amendment immunity. 411 U.S. at 283-285. The ADEA, 29 U.S.C. § 626(c)(1), has identical language, granting jurisdiction to "any court of competent jurisdiction."

This Court has held that Congress must "unequivocal[ly] and textual[ly]" state that eleventh amendment immunity is abrogated in order for a private person to bring an action against a state agency in federal court. *Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989). The clear statement of eleventh amendment abrogation is necessary whether the basis for the statute is passed under Congressional exercise of Commerce Clause or fourteenth amendment, § 5, powers. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243, 105 S.Ct. 3142, 87

L.Ed. 2d 171 (1985); *Dellmuth*, 491 U.S. at 227-228. *See also Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 10-11, 109 S.Ct. 2273, 105 L.Ed. 2d 1 (1989) (plurality opinion).

Petitioner requests the Court grant the writ because this Court has not decided this important issue of the states' sovereign immunity in our federal system. Furthermore, the decisions of the courts of appeal on this issue conflict with the decisions of this court. The lower courts distinguished this Court's holding in *Employees v. Missouri Public Health Department*, 411 U.S. at 283-285, (statutory language granting jurisdiction to "any court of competent jurisdiction" does not suffice to abrogate eleventh amendment immunity) by holding statutes enacted under fourteenth amendment, § 5, powers do not require the same level of statutory clarity as statutes passed under Commerce Clause power. *See*, App. B at 8. Such a distinction is contrary to this Court's holding in *Dellmuth*, 491 U.S. at 230.

The lower courts also held that because the ADEA applies to the states, eleventh amendment immunity is abrogated. *See* App. B. at 7 and the case cited therein. This Court has clearly ruled a distinction must be drawn between *whether* federal legislation applies to the states and *where* a state may be sued under that legislation. *Pennhurst State School & Hospital v. Halderman*, (Pennhurst II) 465 U.S. 89, 99, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984). Simply because a federal statute applies to the states, eleventh amendment immunity is not abrogated. After determining whether the statute applies to the state, the courts must then determine if private persons may bring an action against the state in federal court under the statute *See, e.g., Employees v. Missouri Public Health Department*, 411 U.S. at 285-286.

2. Whether Congress had power to abrogate the states' eleventh amendment immunity when it exercised commerce clause powers in enacting the ADEA?

Assuming the Court finds that Congress did abrogate the States' eleventh amendment immunity in the ADEA, petitioner asks this Court to determine whether Congress can, through exercise of Commerce Clause powers, abrogate the immunity given to the states through the eleventh amendment. The Court must first determine whether the ADEA was enacted exclusively through exercise of Commerce Clause powers. *See EEOC v. Wyoming*, 460 U.S. 226, 243, 103 S.Ct. 1054, 75 L.Ed.2d 18 (1983) (question avoided).

Petitioner suggests that Congress cannot *statutorily* abrogate a constitutional amendment through the exercise of powers emanating from a constitutional provision which was modified by that amendment. *See, e.g., Pennsylvania v. Union Gas Co.*, 491 U.S. at 35-42 (SCALIA, J., concurring in part and dissenting in part). Otherwise, constitutional amendments become subject to, rather than a limitation on, conferred federal legislative power. This principle is illustrated in *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S.Ct. 2666, 2670, 49 L.Ed.2d 614, 620 (1976) where this Court held the fourteenth amendment modified the states' eleventh amendment immunity.

Petitioner requests the Court grant this writ in order to determine the important question of whether Congress can statutorily abrogate a constitutional protection through the exercise of a constitutional power that was modified by the amendment that altered that constitutional power.

CONCLUSION

Petitioner asks this Court grant this writ to finally determine whether there must be statutory language, independent from language which makes the federal legislation applicable to the states, which clearly and unequivocally states that eleventh amendment immunity is abrogated before a private person may sue a state agency in federal court. Assuming the Court finds there was a clear statement abrogating the eleventh amendment in the ADEA, petitioner also asks the Court to decide whether Congress could abrogate the eleventh amendment through the exercise of Commerce Clause powers when it enacted the ADEA.

Respectfully submitted,

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FILED
United States Court of Appeals
Tenth Circuit
July 12, 1994
ROBERT L. HOECKER
CLERK

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHET A. HURD,

Plaintiff-Appellee,

vs.

Case No. 93-3082

PITTSBURG STATE UNIVERSITY,

Defendant-Appellant.

and

WILLIAM MARK SIMMONS,

Defendant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. No. 92-CV-2253)

Carl A. Gallagher, Assistant Attorney General (Robert T. Stephan, Attorney General, with him on the briefs), Topeka, Kansas, for Defendant-Appellant.

Mark A. Buchanan, The Popham Law Firm, P.C., Kansas City, Missouri, for Plaintiff-Appellee.

Paul D. Ramshaw, Attorney (Donald R. Livingston, General Counsel; Gwendolyn Young Reams, Associate General Counsel; and Vincent J. Blackwood, Assistant General Counsel, with him on the brief), U.S. Equal Employment

Opportunity Commission, Washington, D.C., Amicus Curiae.

Before LOGAN and McKAY, Circuit Judges, and SAM,* District Judge.

McKAY, Circuit Judge

The issue in this case is whether lawsuits under the Age Discrimination Employment Act ("ADEA") brought by private litigants against the state in federal court are barred by Eleventh Amendment immunity. In a thorough and well-reasoned opinion published at 821 F.Supp. 1410 (D.Kan. 1993), the district court held that Congress intended to abrogate states' Eleventh Amendment immunity when it passed the ADEA. The only additions we can make to the district court's opinion are the citations for two more cases which support its holding. Specifically, in addition to the case cited by the district court, both the Seventh Circuit, *see Heiar v. Crawford County, Wis.*, 746 F.2d 1190 (1984), *cert. denied*, 472 U.S. 1027 (1985), and the First Circuit, *see Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694 (1st Cir. 1983), have held that Congress intended to abrogate states' Eleventh Amendment immunity when it passed the ADEA. Accordingly, we affirm for substantially the same reasons given by the district court.

AFFIRMED.

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* Honorable David Sam, United States District Judge forthe District of Utah, sitting by designation.

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

CHET A. HURD,

Plaintiff,

v.

Case No. 92-2253-JWL

PITTSBURG STATE UNIVERSITY,

Defendant.

MEMORANDUM AND ORDER

I.

Introduction

This matter comes before the court on Defendant Pittsburg State University's motion to dismiss (Doc. #18). For the reasons set forth below, the motion is granted in part and denied in part.

Plaintiff Chet A. Hurd alleges that Defendant Pittsburg State University discriminatorily discharged him in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* and in breach of an implied employment contract.

The only issue in contention for this motion to dismiss is whether Pittsburg State University ("PSU"), as an agency of the state of Kansas, is entitled to Eleventh Amendment immunity from suit in Federal Court. Both parties agree that 1) PSU is an agency of the state of Kansas pursuant to K.S.A. § 76-711(a) and 2) Mr. Hurd's state law

claim against PSU for breach of an implied contract of employment is subject to Eleventh Amendment immunity. *See Pennhurst State School & Hosp. v. Halderman (Pennhurst II)*, 465 U.S. 89, 119-20 (1984). Therefore, the state law claim will be dismissed.

II.

Discussion

A court may not dismiss a cause of action for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of the theory of recovery that would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The pleadings are liberally construed, and all reasonable inferences are viewed in favor of the plaintiff. Fed. R. Civ. P. 8(a); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984). "All well-pleaded facts, as distinguished from conclusory allegations, must be taken as true." *Swanson*, 750 F.2d at 813. The issue in resolving a motion such as this is not whether the plaintiff will ultimately prevail, but whether he or she is entitled to offer evidence to support the claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

PSU, as a state agency, contends that the Eleventh Amendment prohibits plaintiff Hurd from bringing suit against it under the ADEA in federal court. This court finds that Mr. Hurd's ADEA claim is not barred by application of the Eleventh Amendment. The Eleventh Amendment bars private suits in Federal courts against the states and

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Because the Eleventh Amendment only applies to suits in Federal Courts, this dismissal does not affect Mr. Hurd's right to bring this contract claim in a state court. For the reasons set forth below, the court finds that Mr. Hurd's claims against PSU under the ADEA are not subject to Eleventh Amendment Immunity.

state agencies "seeking to impose liability which must be paid from public funds in the treasury." *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1356, 39 L.Ed.2d 662 (1974). However, Eleventh Amendment immunity may be abrogated where Congress indicates an "unequivocal expression of congressional intent" to do so and authorizes such suits pursuant to section five of the Fourteenth Amendment. *Pennhurst II*, 465 U.S. at 99; *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). Thus, the questions here are whether the ADEA was enacted pursuant to section five of the Fourteenth Amendment and, if so, whether Congress intended that the ADEA abrogate Eleventh Amendment sovereign immunity.

Both the Supreme Court and the Tenth Circuit have declined to rule on whether the ADEA was enacted pursuant to section five of the Fourteenth Amendment. *See EEOC v. Wyoming*, 460 U.S. 226, 243 (1983) (because the Court found that the ADEA was a "valid exercise of Congress' powers under the Commerce Clause," it did not reach the issue whether the ADEA could also have been validly enacted pursuant to section five of the Fourteenth Amendment); *EEOC v. Wyoming Retirement System*, 771 F.2d 1425, 1428 (10th Cir. 1985). This court, however, concludes that the ADEA, as amended in 1974, was enacted pursuant to Congress' powers under section five of the Fourteenth Amendment.

The 1974 amendment extended the protection of the ADEA from merely applying to private sector employees to also including federal, state, and local government employees. Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 28, 88 Stat. 74 (amending 29 U.S.C. § 630).

The legislative history, though not explicit, indicates "a congressional purpose to prevent arbitrary age discrimination within the protected age group by extending the coverage of the Act to state and local governments." *E.E.O.C. v. Elrod*, 674 F.2d 601, 605 (7th Cir. 1982). That prohibition, as the *Elrod* court notes, "is the very essence of the guarantee of 'equal protection of the laws' of the Fourteenth Amendment." *Id.* at 604. Congress does not have to recite the words "Section 5", "Fourteenth Amendment", or "Equal Protection" in order for a statute to be based on it. *E.E.O.C. v. Wyoming*, 460 U.S. 226 (1983). Thus, the legislative purpose is of primary interest here in determining intent to invoke Fourteenth Amendment authority.

The Seventh Circuit has evaluated the purposes and legislative history of the 1974 amendment in some detail and has determined that it was enacted under the authority of section 5 of the Fourteenth Amendment. *Elrod*, 674 F.2d at 603-10. This court agrees with its reasoning. Moreover, virtually all of the reported decisions from courts which have answered the question have likewise found that the ADEA and its amendment were enacted pursuant to the Fourteenth Amendment. *See, e.g., Bell v. Purdue University*, 975 F.2d 422, 425 n.5 (7th Cir. 1992); *Ramirez v. Puerto Rico Fire Service*, 715 F.2d 694, 700 (1st Cir.1983); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Schloesser v. Kansas Dept. of Health & Envt.*, 766 F. Supp. 984, 990 (D. Kan. 1991) (Van Bebber, J.); *Swanson v. Dept. of Health*, 773 F. Supp. 255, 258 (D. Colo. 1991). But see, *Black v. Goodman*, 736 F. Supp. 1042, 1045 (D. Mont. 1990).

The answer to the second question is also in the affirmative.

Congress has abrogated Eleventh Amendment immunity to the states in the ADEA. The ADEA defines "employer" (the class of potential defendants in age discrimination cases) to include "a State or political subdivision of a State or any agency or instrumentality of a State." 29 U.S.C. § 630(b)(2). An "employer" who violates the ADEA is liable for legal and equitable relief. 29 U.S.C. § 626(b) and (c). Congress does not need to explicitly state that it intended to abrogate the states' Eleventh Amendment immunity in order for the court to find that such intent was present. *See, Fullilove v. Klutznick*, 448 U.S. 448, 476-78 (1980). However, "[i]f the Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. ____, 111 S. Ct. 2395, 115 L. Ed. 2d 410, 424 (1991). Congress has made its intention to abrogate the states' Eleventh Amendment immunity crystal clear by providing that states which violate the ADEA are liable for legal and equitable relief. *See Davidson v. Board of Governors of State Colleges & Universities*, 920 F.2d 441, 443 (7th Cir. 1990). This court believes that the ADEA's express authorization for the maintenance of suits against state employers adequately demonstrates congressional intent that the states' Eleventh Amendment immunity be abrogated in suits under the ADEA.

The defendant argues that its position is bolstered by a Supreme Court case holding that the Fair Labor Standards Act (FLSA)did not show congressional intent to abrogate Eleventh Amendment immunity to suit in a federal forum. *See, Employees v. Missouri Department of Public Health &*

Welfare, 411 U.S. 279, 285 (1973). This court does not agree. It is correct that certain language of the FLSA construed in *Employees* is identical to the jurisdictional language in the ADEA. The FLSA authorizes suits "in any court of competent jurisdiction" against state owned hospitals, mental health institutions, and schools for unpaid minimum wages or unpaid overtime compensation. 29 U.S.C. § 216(b). The Court held in *Employees* that this language did not give sufficient indication of Congress' intent to abrogate states' immunity from suit in federal courts. Therefore, such intent was not found.

Even though ADEA actions may also be brought "in any court of competent jurisdiction," 29 U.S.C. § 626(c), *Employees* is distinguishable from the present case because the FLSA was enacted only pursuant to the Commerce Clause, *Id.* at 282, while the ADEA was enacted, as discussed above, pursuant to section 5 of the Fourteenth Amendment as well. A statute enacted under the Equal Protection clause may abrogate Eleventh Amendment immunity if Congress also expresses its intent to abrogate the states' immunity. *Pennhurst II*, 465 U.S. at 99. However, the Court is very reluctant to infer Congress' intent to override the Eleventh Amendment when Congress is legislating pursuant to the Commerce Clause. *Employees*, 411 U.S. at 285.

Also, the version of the FLSA under consideration in *Employees* defined "employers" to exclude "any State or political subdivision of a State" except for state owned hospitals, institutions, and schools. 29 U.S.C.S. § 203 notes on 1974 amendment (1975). This hesitancy to sue the states is not present in the ADEA, as amended. The ADEA authorizes suits against "a State or political subdivision of a

State and any agency or instrumentality of a State or a political subdivision of a State." 29 U.S.C. § 630(b). Therefore, this court finds that the *Employees* case is not controlling on the issue of whether the ADEA shows a Congressional intent to abrogate the states' Eleventh Amendment rights.

III.

Conclusion

IT IS THEREFORE ORDERED BY THE COURT that Defendant Pittsburg State University's motion to dismiss (Doc. #18) is granted in part and denied in part.

IT IS FURTHER ORDERED that Defendant Pittsburg State University's motion to dismiss relating to the Plaintiff's age discrimination claim under the ADEA is denied.

IT IS FURTHER ORDERED that Plaintiff's claim against Defendant Pittsburg State University for breach of an implied contract of employment is dismissed.

IT IS SO ORDERED.

Dated this day of _____ at Kansas City, Kansas.

John W. Lungstrum
United States District Judge